No. 07-458

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IN THE

Supreme Court of the United States

TOMI WHITE BRYAN, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR BELLSOUTH TELECOMMUNICATIONS, INC.

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly applied to the specific facts of this case the long-established rule of *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), reaffirmed in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), that federal-question jurisdiction exists when a plaintiff's state-law claim necessarily requires resolution of a substantial federal question.

2. Whether the Fourth Circuit correctly applied *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986), to affirm an injunction under the relitigation exception to the Anti-Injunction Act, where the allegedly preclusive state-court decision was interlocutory and would have had no binding effect in state court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent BellSouth Telecommunications, Inc. states the following:

BellSouth Telecommunications, Inc. is an indirect subsidiary of AT&T Inc. AT&T Inc. is a holding company whose subsidiaries and affiliates provide wireline and wireless voice and data communications and directory publishing and advertising services and products in the United States and abroad. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The petition presents no question warranting review by this Court.

Petitioner first asserts that the Fourth Circuit erred in holding at a prior stage in this case that federal jurisdiction existed because her complaint necessarily required resolution of a substantial question of federal law. In this regard, petitioner does not argue that the Fourth Circuit adopted an incorrect rule of law, nor does she identify any court of appeals decision that conflicts with the decision below. Rather, she seeks review of the wholly fact-bound question whether the allegations in her particular complaint can be interpreted to seek relief that does not depend on federal law.

As an initial matter, the issue raised by petitioner is not properly presented here. The Fourth Circuit resolved the issue in a prior decision after which, on remand, a final judgment was issued against (and not appealed by) petitioner. In the current proceeding to enforce that judgment, petitioner's claim that the district court lacked federal court jurisdiction to enter the judgment in the first place is barred by established principles of *res judicata*.

Additionally, and in any event, although the petition does not acknowledge this fact, petitioner already sought certiorari on this same question in 2004 when the Fourth Circuit first concluded that federal jurisdiction existed,[1] and this Court denied review. *See Bryan v. BellSouth Telecomms., Inc.*, 543 U.S. 1187 (2005). Contrary to petitioner's argument, this

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[1] *See* Petition for a Writ of Certiorari, *Bryan v. BellSouth Telecomms., Inc.*, No. 04-705 (U.S. filed Nov. 22, 2004) ("*Bryan I* Pet.").

Court's intervening decision in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), does not change the applicable law on federal jurisdiction. The Court found that federal jurisdiction existed in that case and, in so doing, reiterated the established legal principles applied by the Fourth Circuit here.

Petitioner next contends that the Fourth Circuit misapplied this Court's decision in *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986). In making that argument, petitioner ignores the fact, emphasized by the Fourth Circuit, that here the state court's denial of BellSouth's motion to dismiss was interlocutory. Under established North Carolina law, therefore, that state-court decision had no preclusive effect in either state court or federal court. By its terms, *Parsons Steel* applies only to "final[]" determinations of state courts, *id.* at 524, and thus, as the Fourth Circuit explained, does not preclude an injunction where, as here, the relevant decision was not entitled to res judicata effect under state law. *See* Pet. App. 16a-17a. In any event, petitioner again identifies no court of appeals decision that conflicts with the decision below – in fact, the Fourth Circuit decision here accords with the analysis of other courts of appeals, *see infra* p. 19 – and at best seeks correction of a purported error in the application of an undisputed rule of law to the particular facts of her case.

STATEMENT OF THE CASE

1. BellSouth, a provider of interstate telecommunications services, is subject to federal regulation as a common carrier under the federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.* As relevant here, under the Communications Act, BellSouth must file with the Federal Communications Commission ("FCC") publicly available tariffs setting forth its charges. *See id.* § 203(a). BellSouth must also contribute a percentage of its revenues to the federal Universal Service Fund ("USF"), which subsidizes telecommunications services for schools, health-care providers, libraries, and rural and low-income customers. *See id.* § 254; 47 C.F.R. § 54.706(c).

The FCC has authorized carriers to recover the costs of USF contributions from their customers either through the rates they charge for telecommunications services or through a separate itemized charge. BellSouth has always recovered costs related to its contributions through a line-item charge on each customer's bill for a "Federal Universal Service Charge" ("FUSC"). *See* Joint Appendix at 159, *Bryan v. BellSouth Telecomms., Inc.*, No. 03-1316 (4th Cir. filed May 12, 2003) ("*Bryan I* 4th Cir. J.A."). BellSouth's federal tariffs, duly filed with the FCC, detail the amount of the FUSC, how the FUSC is calculated, and how it appears on customers' bills. The tariffs describe in detail both the calculation of BellSouth's contribution to the USF and how BellSouth arrives at the FUSC it charges to customers. *See id.* at 165-66 (examples of such calculations in BellSouth's March 18, 2002 tariff).

In a December 2002 order, the FCC adopted new rules, in force from April 2003 forward, that prohibited carriers from "marking up" their USF line items

and charging customers more than their pro rata share of the carrier's contribution. *See* Report and Order & Second Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, 17 FCC Rcd 24952, ¶¶ 51-52 (2002). Although BellSouth never "marked up" its line-item charge, before April 2003 the FCC permitted carriers to charge customers on a non-pro rata basis, so long as carriers did not "shift more than an equitable share of their contributions to any customer or group of customers" and "provide[d] accurate, truthful, and complete information regarding the nature of the charge." *Id.* ¶ 10.

2. On February 22, 2002, petitioner filed this putative class action against BellSouth in the Superior Court of Guilford County, North Carolina, alleging that BellSouth's FUSC violated North Carolina's Unfair and Deceptive Trade Practices Act. BellSouth removed the action to federal court pursuant to 28 U.S.C. § 1331 and § 1441. Petitioner then filed an amended complaint in federal court, alleging that BellSouth's FUSC was excessive; that BellSouth did not disclose how it calculated the FUSC; and that BellSouth's use of the term "Federal Universal Service Charge" was misleading. BellSouth moved to dismiss on a number of grounds, including that the claims were barred by the filed-rate doctrine because they challenged BellSouth's filed tariff. The district court granted the motion to dismiss with respect to two of petitioner's three claims, but found that the third claim for unfair trade practices arose exclusively under state law. *See Bryan I* Pet. App. 37a-38a. The district court declined to exercise supplemental jurisdiction over that claim and remanded it to state court. *See id.* at 39a.

BellSouth appealed the district court's remand of the unfair trade practices claim to the Fourth Circuit; petitioner did not appeal the dismissal of the other two claims. While BellSouth's Fourth Circuit appeal was pending, the portion of the action that had been remanded proceeded in state court, with petitioner filing a second amended complaint.

3. In July 2004, the Fourth Circuit ruled in favor of BellSouth as to the lone claim that the district court had not dismissed. *See Bryan v. BellSouth Telecomms., Inc.*, 377 F.3d 424 (4th Cir. 2004) ("*Bryan I*"). The court of appeals held that petitioner's unfair trade practices claim, like her other two claims, challenged BellSouth's federal tariff and thus was barred by the filed-rate doctrine. *See id.* at 430-31. The court of appeals vacated the district court's remand order and returned the case to the district court with instructions to dismiss the unfair trade practices claim. *See id.* at 432.

In reaching that conclusion, the Fourth Circuit specifically applied this Court's decision in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), to conclude that there was federal jurisdiction over the unfair trade practices claim. As the court of appeals explained, "when, as here, state law creates the plaintiff's cause of action, the lower federal courts possess jurisdiction to hear 'only those cases in which a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Bryan I*, 377 F.3d at 428-29 (quoting *Franchise Tax Board*, 463 U.S. at 27-28) (ellipsis in original). In this instance, because a federal tariff has the force of federal law and petitioner's claim would necessarily require a deviation from the rate

established by that federal tariff, that claim necessarily required resolution of an issue of federal law under *Franchise Tax Board*. *See id.* at 430-31.

Although Judge Luttig dissented from the Fourth Circuit's resolution of this issue, he agreed with the majority that "claims requiring the court to second-guess the reasonableness" of the rate set forth in the tariff "are properly said to require the court to resolve a substantial federal question." *Id.* at 435. Judge Luttig disagreed only as to a case-specific issue: whether petitioner's complaint was plausibly read to seek damages other than a refund of the FUSC.

4. On November 22, 2004, petitioner petitioned for certiorari from *Bryan I*. She argued, among other things, that federal jurisdiction did not exist over her unfair trade practices claim. *See Bryan I* Pet. 10-15 (arguing that "Bryan's state law claims for violation of the [North Carolina unfair trade practices statute] do not state a claim for relief under federal law" and that the Fourth Circuit erred in "conclud[ing] that any measure of damage would require the trial court to determine the 'reasonable rate' BellSouth should have charged" under a federal tariff).

BellSouth opposed certiorari. With respect to the jurisdictional issue, BellSouth pointed out, among other things, that the Fourth Circuit had applied the settled standard of *Franchise Tax Board* and that petitioner at best sought review of the majority's fact-bound decision that her complaint required determination of the federal question. *See* Brief of Respondent in Opposition at 13-17, *Bryan v. BellSouth Telecomms., Inc.*, No. 04-705 (U.S. filed Jan. 26, 2005) ("*Bryan I* BIO") (in arguing that the Fourth Circuit erred because the complaint "does not in fact

seek a refund of the tariffed rate," petitioner "seeks mere correction of error"). BellSouth further noted that, although the Court had recently granted certiorari in *Grable & Sons* – the case on which petitioner now places primary emphasis – that case involved different issues and thus there was no reason to hold petitioner's petition pending the resolution of the distinct issue presented there. *See id.* at 14 n.13.

On February 28, 2005, the Court denied certiorari without awaiting the resolution of *Grable & Sons*. *See Bryan I*, 543 U.S. 1187; *see also Grable & Sons*, 545 U.S. 308.

5. Following the Fourth Circuit's remand, the district court dismissed the unfair trade practices claim and denied petitioner's motion to file a second amended complaint, entering final judgment in favor of BellSouth. The district court found that petitioner's proposed second amended complaint – which was substantively identical to petitioner's second amended complaint in state court – simply sought to reword the same unfair trade practices claim that had already been dismissed. *See* Joint Appendix at 117, *Bryan v. BellSouth Telecomms., Inc.*, No. 06-1746 (4th Cir. filed Sept. 6, 2006). Petitioner did not appeal the final judgment.

After the district court's entry of final judgment and this Court's denial of certiorari in *Bryan I*, BellSouth moved to dismiss in state court, arguing that the Fourth Circuit's vacatur of the district court's remand order rendered the remand order a nullity and deprived the state court of jurisdiction. *See id.* at 122. BellSouth also moved to dismiss the state action on the basis of res judicata, collateral estoppel, and the filed-rate doctrine. *See id.* at 120-23. The state court denied BellSouth's motion. *See id.* at 124.

Faced with the possibility of an inconsistent state-court judgment on the exact claim dismissed with prejudice by the federal court, BellSouth returned to the district court and sought an injunction of the state-court proceedings under the All Writs Act.

The district court granted the injunction. *See* Pet. App. 46a.

6. Petitioner appealed, and the Fourth Circuit affirmed the district court's decision. *See* Pet. App. 1a-22a. The court of appeals first rejected petitioner's argument that the district court lacked subject-matter jurisdiction to issue the injunction. The court of appeals observed that the district court had subject-matter jurisdiction when it issued the order finally dismissing the unfair trade practices claim, and that it retained jurisdiction to enforce that judgment. *See id.* at 7a.

Petitioner next argued that the injunction was inappropriate under the Anti-Injunction Act, which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Fourth Circuit held that this statute did not bar the injunction granted by the district court because this case fell within the Anti-Injunction Act's "relitigation" exception for injunctions necessary "to protect or effectuate" a federal court's judgment. The court of appeals concluded that "Bryan in the state-court action is seeking to litigate the very claim that we have concluded must be dismissed under the filed-rate doctrine." Pet. App. 15a.

The Fourth Circuit then explained that its resolution of this issue was consistent with this Court's

decision in *Parsons Steel* – a case that petitioner had not cited in her brief, but that BellSouth had noted and distinguished in its brief as appellee. *See* Brief of Appellee BellSouth Telecommunications, Inc. at 31-33, *Bryan v. BellSouth Telecomms., Inc.*, No. 06-1746 (4th Cir. filed Oct. 6, 2006). In *Parsons Steel*, this Court held that the Anti-Injunction Act did not create an exception to the Full Faith and Credit Act, which requires a federal court to give a state-court judgment the same preclusive effect it would have in another court of that state: "Once the state court has *finally* rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision." 474 U.S. at 524 (emphasis added).

The Fourth Circuit reasoned that, under *Parsons Steel*, it was required to consider whether the North Carolina court's decision would be entitled to res judicata effect under North Carolina law. *See* Pet. App. 17a. The court of appeals determined that the state-court decision did not have such preclusive effect, because North Carolina requires a "final judgment on the merits" for res judicata and does not classify an order denying a Rule 12(b)(6) motion to dismiss as a final judgment. *See id.* (internal quotation marks and emphasis omitted). Accordingly, the Fourth Circuit concluded that an injunction against further prosecution of petitioner's state-court action was consistent with the All Writs Act, the Anti-Injunction Act, and the Full Faith and Credit Act. *See id.*

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT'S FINDING OF FEDERAL JURISDICTION INVOLVES A STRAIGHTFORWARD AND CORRECT APPLICATION OF THE ESTABLISHED PRINCIPLES OF *FRANCHISE TAX BOARD* TO THE FACTS OF THIS CASE

In its recent decision, the Fourth Circuit concluded that the district court had subject-matter jurisdiction to issue its injunction because federal courts have jurisdiction to enforce their own judgments. Petitioner does not challenge that ruling. Rather, petitioner argues that the federal district court lacked jurisdiction to issue its original judgment and therefore lacked jurisdiction to protect its judgment through an injunction. That argument (which was not even made to the Fourth Circuit during the most recent appeal) lacks merit and, in fact, is one on which the Court *already* denied certiorari when petitioner sought review of *Bryan I*.

A. As an initial matter, petitioner's argument is barred by well-established principles of res judicata. After the Fourth Circuit's remand in *Bryan I*, the district court entered a final judgment finding subject-matter jurisdiction over petitioner's remaining state-law claim and dismissing the claim with prejudice. Petitioner did not appeal from that final judgment, which accordingly became entitled to res judicata effect. Petitioner cannot contest the district court's injunction to enforce its judgment by collaterally attacking the original judgment as one that the court lacked jurisdiction to enter.

A final judgment is ordinarily not subject to collateral attack in a subsequent proceeding to enforce the judgment. That principle applies even when

the subject-matter jurisdiction of the initial court is called into question. *See, e.g.*, Restatement (Second) of Judgments § 12 (1982); *Baella-Silva v. Hulsey*, 454 F.3d 5, 9-10 (1st Cir. 2006) (on appeal from district court's order imposing sanctions for breach of settlement agreement, plaintiffs could not collaterally attack settlement judgment on ground that district court lacked subject-matter jurisdiction); *Mitchell v. Commission on Adult Entm't Establishments*, 12 F.3d 406, 408-09 (3d Cir. 1993) (state could not challenge on Eleventh Amendment grounds order imposing statutory costs based on adverse judgment when state failed to appeal from original judgment); *see also Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (collecting cases holding that parties may not challenge a district court's final judgment for lack of subject-matter jurisdiction through a motion to vacate under Federal Rule of Civil Procedure 60(b)(4)). "This Court has long recognized that '[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues.'" *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982) (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932)) (alteration in original). Thus, "[a] party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982).

B. Even if petitioner's argument were not barred, she provides no plausible basis for this Court to revisit its decision to deny review on this same question.

In Bryan I, the Fourth Circuit determined that petitioner's unfair trade practices claim arose under federal law because her "'right to relief necessarily depend[ed] on resolution of a substantial question of federal law.'" 377 F.3d at 429 (quoting *Franchise Tax Board*, 463 U.S. at 27-28). Although petitioner conceded that the Fourth Circuit, relying on *Franchise Tax Board*, had identified the existence of a "substantial question of federal law" as the basis for jurisdiction, she argued that no such question "appear[ed] in [the] complaint" in her case, *Bryan I* Pet. 12, because, she claimed, she had not sought damages that would effectively alter the filed federally tariffed rate. *See, e.g., id.* at 13 ("A damage measure superimposed upon the Complaint by a defendant or a Court cannot form the basis for federal question jurisdiction.").[2] In response, BellSouth demonstrated that this argument lacked merit because "a plain reading of the complaint makes clear that petitioner seeks the precise relief she now disclaims," and, in any event, involved a case-specific application of settled legal principles. *Bryan I* BIO 13-17. As noted, the Court denied certiorari.

In her current petition, petitioner again claims that the Fourth Circuit erred in determining in *Bryan I* that "Bryan's amended complaint arose under federal law because it presented a substantial question of federal law." Pet. 10. In seeking to revive the same claim as to which the Court previously denied review, petitioner now argues primarily that certiorari

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[2] Petitioner also contended that the Fourth Circuit relied on a complete-preemption theory of federal-question jurisdiction. *See Bryan I* Pet. 11-12. In response, BellSouth demonstrated that the Fourth Circuit had in fact disclaimed such a theory. *See Bryan I* BIO 12-13; *see also infra* p. 16.

is warranted because, under this Court's more recent decision in *Grable & Sons*, she "has not pleaded a federal cause of action." *Id.*

That argument lacks merit. As an initial matter, this Court granted review in *Grable & Sons* while the *Bryan I* petition was still pending, and thus the Court could have held *Bryan I* pending its resolution of that matter. BellSouth, however, demonstrated that *Grable & Sons* had no relevance to the prior petition raising this same issue and thus that there was no reason to hold the *Bryan I* petition, *see Bryan I* BIO 14 n.13, and the Court denied certiorari without awaiting the resolution of *Grable & Sons*.

In any event, nothing about *Grable & Sons* casts doubt on the Fourth Circuit's decision. First, as the Court itself has made clear, it granted review in *Grable & Sons* to resolve a conflict between the circuits as to whether a court could premise federal jurisdiction on a violation of a federal statute *that did not provide a private right of action*. *See* 545 U.S. at 311-12 (explaining that the Court granted review "to resolve a split within the Courts of Appeals" as to whether there must "always" be a "federal cause of action as a condition for exercising federal-question jurisdiction"). The federal Communications Act, however, *does* provide a private cause of action. *See* 47 U.S.C. §§ 206, 207. Congress has thus expressed its view that questions involving violations of the Communications Act, or challenges to tariffs given the force of law by the Communications Act, are "substantial" enough to belong in federal court. Thus, the issue posed in *Grable & Sons* is simply irrelevant to the Fourth Circuit's decision.

Moreover, *Grable & Sons* resolved the split among the circuits as to that distinct issue in *favor* of federal

jurisdiction. *Grable & Sons* reaffirmed the possibility of jurisdiction under *Franchise Tax Board* even in cases where the federal statute at issue does not provide a private cause of action. As the Court explained, it has "recognized for nearly 100 years that in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues." 545 U.S. at 312. *Grable & Sons* emphasized the "constant refrain" in early cases, and in *Franchise Tax Board* itself, that federal jurisdiction demanded a "substantial" federal issue and depended on a "'welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.'" *Id.* at 313-14 (quoting *Franchise Tax Board*, 463 U.S. at 8). Those statements hardly provide a basis to question the Fourth Circuit's conclusion in *Bryan I* that this particular case – where, the court of appeals concluded, relief would necessarily alter federally tariffed rates – implicates sufficient federal interests to support federal jurisdiction.

Petitioner also briefly discusses (at 14-15) this Court's 2006 decision in *Empire Healthchoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121 (2006), but that case likewise provides no basis for review here. There, the Court granted certiorari to resolve a split among the circuits regarding whether federal jurisdiction existed over a health insurance carrier's contract-derived reimbursement claim. *See id.* at 2130. The Court held that Empire's reimbursement claim was not a "creature of federal law" and that, examining the particular statute at issue (the Federal Employees Health Benefits Act of 1959, or "FEHBA"), if Congress had intended these contract-based claims to be litigated in federal court, Congress

would have explicitly extended federal jurisdiction to them. *I* t 2134-35. Here, however, a tariff filed under the Communications Act *is* a creature of federal law, not an ordinary contract. *See, e.g., Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998); *Western Union Int'l, Inc. v. Data Dev., Inc.*, 41 F.3d 1494, 1496 (11th Cir. 1995); *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992); *see also Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534-35 (1983) (federal jurisdiction exists over suit to recover under federal tariff); *Louisville & N.R.R. Co. v. Rice*, 247 U.S. 201, 203 (1918) (same). Moreover, as discussed above, the Communications Act, unlike FEHBA, *does* create a private cause of action. Thus, the circuits uniformly agree that a suit to alter or enforce a telecommunications tariff arises under federal law and is properly pursued in federal court. *See, e.g., Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1315-17 (11th Cir. 2004) (state-law claims for fraud and unfair trade practices raised substantial questions of federal law under a filed tariff); *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 478 (9th Cir. 2000) (action arising from a filed tariff presents a federal question); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 486, 488-49 (7th Cir. 1998) (suit to enforce or to invalidate a tariff arises under federal law); *see also AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 227 (1998) ("The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.") (internal quotation marks omitted).

Petitioner nevertheless argues that her claims raise no "federal issue" because, in her view, the FCC allegedly has "determined that USF mark-ups such

as those imposed by BellSouth on its customers are unreasonable." Pet. 12. Contrary to petitioner's apparent belief, however, the fact that her argument necessarily turns on her understanding of a federal agency's decision regarding the reasonableness of federally tariffed rates strongly confirms that the Fourth Circuit correctly understood petitioner's claims to be inherently federal in nature.

Petitioner also recycles from her prior petition, *see supra* note 2, the argument that Congress did not intend completely to preempt state claims in the Communications Act. *See* Pet. 13-14. But that argument remains irrelevant: the Fourth Circuit made plain that it did not rely on the doctrine of complete preemption. *See Bryan I*, 377 F.3d at 429 n.5 ("[W]e need not determine whether the doctrine of complete preemption applies."). For that reason, the only two court of appeals cases that petitioner cites in relation to her first question presented in no way conflict with the Fourth Circuit's decision. *See* Pet. 14 (citing *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir. 2000); *In re Long Distance Telecomms. Litig.*, 831 F.2d 627 (6th Cir. 1987)). Those decisions conclude only that the Communications Act did not completely preempt state law in the field of telecommunications, an issue that the Fourth Circuit disclaimed addressing.

C. In the end, petitioner is simply repeating the same fact-bound claim of error as to which this Court has already denied certiorari. Petitioner does not claim that the Fourth Circuit articulated an incorrect rule of law in evaluating jurisdiction under *Franchise Tax Board*, or that any court of appeals decision conflicts with the decision below. Rather, she argues (at 11-13) that she did not in fact seek a "refund" of the

tariffed FUSC rate or challenge the filed rate. But the Fourth Circuit found that the complaint could not be interpreted to seek any damages other than such a refund. *See supra* pp. 5-6. To the extent petitioner contends otherwise, she is at best quibbling with the Fourth Circuit's resolution of the entirely fact-bound question of how to read her particular complaint. In any event, even if the complaint by its terms did not demand a refund of the FUSC, *any* damages awarded to petitioner would effectively lower the tariffed rate in a manner inconsistent with federal law. *See, e.g., Hill*, 364 F.3d at 1316; *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 21 (2d Cir. 1994); *Taffet v. Southern Co.*, 967 F.2d 1483, 1489 (11th Cir. 1992) (en banc); *see also Bryan I*, 377 F.3d at 430-31 (noting that other circuits had accepted this argument, but finding it unnecessary to rely on it).

II. THE FOURTH CIRCUIT'S UNDERSTANDING OF THE ANTI-INJUNCTION ACT WAS CORRECT AND RAISES NO ISSUE WARRANTING REVIEW BY THIS COURT

The Fourth Circuit affirmed the district court's grant of an injunction under the relitigation exception to the Anti-Injunction Act, which permits a district court to enjoin "'state litigation of an issue that previously was presented to and decided by the federal court,'" and is "'founded in the well-recognized concepts of res judicata and collateral estoppel.'" Pet. App. 8a (quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988)). The court of appeals first rejected petitioner's argument that the claim she asserted in state court was different from the claim dismissed under the filed-rate doctrine by the district court. *See id.* at 9a-15a. Next, the court of appeals

found that the injunction was consistent with the Full Faith and Credit Act and with *Parsons Steel*, because the state court's earlier ruling on the res judicata issue was interlocutory and was not entitled to preclusive effect under state law. *See id.* at 15a-17a. Petitioner challenges only the second ruling.

In *Parsons Steel*, this Court held that the relitigation exception to the Anti-Injunction Act applied only "to those situations in which the state court has not yet ruled on the merits of the res judicata issue": "Once the state court has *finally* rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision." 474 U.S. at 524 (emphasis added).

The Fourth Circuit faithfully applied this Court's decision. As *Parsons Steel* directs, the court of appeals "turn[ed] to state law to determine the preclusive effect of the state court's decision." *Id.* In particular, the Fourth Circuit determined that, under state law, the state court's decision at issue here – a denial of a motion to dismiss – was not entitled to preclusive effect. *See* Pet. App. 17a (discussing requirements for preclusion under North Carolina law). The court of appeals then determined that North Carolina law requires a "final judgment on the merits" for res judicata and that an order denying a motion to dismiss was not a "final judgment or order" under North Carolina law. *Id.* (internal quotation marks and emphasis omitted). Accordingly, the Fourth Circuit concluded that a North Carolina court would not be obliged to give res judicata effect to the denial of BellSouth's motion to dismiss, and

thus neither was the district court under *Parsons Steel*. *See id.*

Petitioner does not dispute either that the state-court order was interlocutory or that it would not be given preclusive effect under state law. Instead, petitioner simply ignores that the *Parsons Steel* rule comes into play only when a state court has "*finally* rejected a claim of res judicata" – which plainly did not occur here – and requires only that federal courts give state-court judgments "the same full faith and credit" or preclusive effect "as they have by law or usage in the courts of such State," 28 U.S.C. § 1738 (Full Faith and Credit Act). Indeed, that key language from *Parsons Steel* is mentioned nowhere in her petition. Petitioner's argument is thus unavailing.

Nor does petitioner claim that there is a circuit conflict on this issue. In fact, the Fourth Circuit's holding is fully consistent with other circuits' determinations as to the preclusive effect in these circumstances of interlocutory state-court decisions. *See, e.g., Duffy & McGovern Accommodation Servs. v. QCI Marine Offshore, Inc.*, 448 F.3d 825, 828-89 (5th Cir. 2006) (state court's interlocutory denial of motion to dismiss was not preclusive under state law, and therefore *Parsons Steel* did not forbid a federal court from enjoining the state-court proceedings); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989) (state court's denial of summary judgment on res judicata issue was not entitled to preclusive effect under state law, and therefore district court properly issued injunction under relitigation exception).

In sum, review is not warranted here both because the Fourth Circuit's decision was correct on this issue

and because, in any event, the petition at best seeks fact-bound error correction with respect to the Fourth Circuit's application of the undisputed rule of law established in *Parsons Steel*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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